

Tri-State Regional Special Education Law Conference

General Education Interventions and RTI: Policy and Legal Issues

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I. Introduction

There has been increased attention to the use of general education interventions in addressing students' needs before unnecessarily referring them for a special education evaluation. The number of students who were on IEPs decreased by approximately 240,000 students from the 2004-05 school year when students with disabilities comprised 13.8% of the nation's school population to the 2009-10 school year when students with disabilities comprised 13.1% of the school population. This is the first decrease since the IDEA first went into effect in the 1976-77 school year. Shifting Trends in Special Education Thomas Fordham Institute.

II. Definitions

A. Response To Intervention (RTI)

1. The IDEA statute and regulations use the term "response to scientific, research based intervention" (commonly referred to as Response to Intervention) only as it applies to an alternative part of the process to identify whether a student has a specific learning disability (IDEA Regulation 34 CFR 300.307). There is no definition of RTI in the IDEA statute or regulations.
2. The United States Department of Education, Office of Special Education Programs has addressed the definition of RTI in a Memorandum to the States: Specifically, OSEP has stated:
A multi-tiered instructional framework, often referred to as RTI, is a school-wide approach that addresses the needs of all students, including struggling learners and students with disabilities, and integrates assessment and intervention within a multi-level instructional and behavioral system to maximize student achievement and reduce problem behaviors. With a multi-tiered instructional framework, schools identify students at-risk for poor learning outcomes, monitor student progress, provide evidence-based interventions, and adjust the intensity and nature

of those interventions depending on a student's responsiveness.
Memorandum to State Directors of Special Education 56 IDELR 50
(United States Department of Education, Office of Special Education
Programs (2011)). (emphasis added)

3. What is RTI? Rigorous implementation of RTI includes a combination of high quality, culturally and linguistically responsive instruction; assessment; and evidence-based intervention. Comprehensive RTI implementation will contribute to more meaningful identification of learning and behavioral problems, improve instructional quality, provide all students with the best opportunities to succeed in school, and assist with the identification of learning disabilities and other disabilities.
National Center on Response To Intervention Note: The National Center on Response to Intervention is housed at the American Institutes for Research and works in conjunction with researchers from Vanderbilt University and the University of Kansas. It is funded by the U.S. Department of Education's Office of Special Education Programs (OSEP).
4. See Appendix A for state specific information for Iowa, Kansas and Nebraska.

B. Coordinated Early Intervening Services (CEIS)

The IDEA regulations allow a Local Education Agency (LEA) to use up to 15% of its Part B grant to “develop and implement coordinated, early intervening services, which may include interagency financing structures, for students in kindergarten through grade 12 (with a particular emphasis on students in kindergarten through grade three) who are not currently identified as needing special education or related services, but who need additional academic and behavioral support to succeed in a general education environment.” 34 CFR 300.226(a).

III. Response to Intervention

- A. There has been a great deal of discussion and misunderstanding of the term response to intervention (RTI) as it is presently used in the IDEA and regulations as criteria for determining whether a student has a specific learning disability (SLD) and how it is used generally to refer to interventions for all children.

RTI strategies are tools that enable educators to target instructional interventions to childrens' areas of specific need as soon as those needs become apparent. (Questions and Answers on Response to Intervention and Early Intervening Services (U.S. Office for Special Education and Rehabilitative Services (OSERS) (2007)). The term RTI, in many cases, has been misunderstood to be part of the

special education process since it is referred to in the IDEA. Challenges exist in trying to fully understand the purpose of RTI—that children should not be misclassified as having a disability if they haven’t received effective, research based instruction through general education.

While the Department of Education does not subscribe to a particular RTI framework, the core characteristics that underpin all RTI models are: (1) students receive high quality research-based instruction in their general education setting; (2) continuous monitoring of student performance; (3) all students are screened for academic and behavioral problems; and (4) multiple levels (tiers) of instruction that are progressively more intense, based on the student's response to instruction. OSEP supports State and local implementation of RTI strategies to ensure that children who are struggling academically and behaviorally are identified early and provided needed interventions in a timely and effective manner. Many LEAs have implemented successful RTI strategies, thus ensuring that children who do not respond to interventions and are potentially eligible for special education and related services are referred for evaluation; and those children who simply need intense short-term interventions are provided those interventions. Memorandum to State Directors of Special Education 56 IDELR 50 (United States Department of Education, Office of Special Education Programs (2011)).

- B. An LEA may opt out of using the severe discrepancy part of the specific learning disabilities definition (SLD) and replace it by using a response to scientific research based intervention (RTI) model of eligibility as part of the evaluation procedures (IDEA Regulation 300.307).

The definition of an SLD goes beyond a mere determination of whether the student is experiencing a “severe discrepancy” or is not successful under a RTI process model. As the comments to the IDEA regulations state, “the evaluation of a child suspected as having a disability, including an SLD, must include a variety of assessment tools and strategies and cannot rely on any single procedure as the sole criterion for determining eligibility” (Federal Register, Page 46646). “An RTI process does not replace the need for a comprehensive evaluation. A public agency must use a variety of data gathering tools and strategies even if an RTI process is used. The results of an RTI process may be one component of the information reviewed as part of the evaluation procedures required...” (Federal Register, Page 46648). (emphasis added)

- C. The IDEA does not require or encourage an LEA to use an RTI approach prior to a referral for a special education evaluation as part of determining whether 3-5 year olds are eligible for special education since the category of SLD is generally not applicable to preschool children with disabilities. OSEP further stated that “The IDEA and the Part B regulations do not address the use of an RTI model for children suspected of having other disabilities.” Letter to Brekken 56 IDELR 80 (United States Department of Education, Office of Special

Education Programs (201)).

- D. Parental consent must be promptly requested to evaluate if the child needs special education and related services. If the child has not made adequate progress after an appropriate period of time, a referral for a special education evaluation must be made (IDEA Regulation 300.309 (c)). The terms “promptly” and adequate” are not defined in the IDEA regulations. A State may choose to establish a specific timeline that would require an LEA to seek parental consent for an evaluation if a student has not made progress that the district deemed adequate (Questions and Answers on Response to Intervention and Early Intervening Services, Question C-5 47 IDELR 196 (United States Department of Education, Office of Special Education and Rehabilitative Services (2007))).
- E. CEIS funds (up to 15% of Part B IDEA funds) may be used to support RTI as long as the CEIS funds are used for services to nondisabled students in need of additional academic or behavioral support and supplement, not supplant, other funds used to implement RTI. LEAs must ensure that CEIS funds are used to provide services only to students who need additional academic and behavioral support, and not to students who currently receive special education and related services.
- For example, one RTI framework includes a three-level continuum of instructional support. In this framework, tier one applies to all students in a general education setting. It would not be appropriate to use CEIS funds for tier one activities that support these students because these activities are designed to provide high-quality instruction to the entire class or school and not principally intended to address the needs of students who are struggling. Tier two activities provide specialized small group instruction for students determined to be at risk for academic and behavioral problems. It would be appropriate to use CEIS funds to support these tier two activities for at-risk, general education students. If students who are receiving special education and related services participate in the small group instruction, it would not be appropriate for CEIS funds to be used for these students as CEIS may not be provided to students that are currently identified as needing special education or related services. Tier three includes specialized individualized instructional or behavioral support for students with intensive needs. As in the case of tier two activities, CEIS funds could be used for activities that support general education students at risk for academic and behavioral problems, but could not be used for students who are receiving special education or related services. Memorandum to Chief State School Officers and State Directors of Special Education, Question 10 51 IDELR 49 (United States Department of Education, Office of Special Education Programs (2008))
- F. Data on the use of RTI
- State agencies support the implementation of RTI.

In all but two states, there is a state-level RTI task force, commission, or internal working group according to special education coordinators. Other commonly reported state activities and resources include: the provision of training on RTI (40 states), the issuance of RTI guidelines (39 states), and the provision of RTI information on SEA websites (39 states).

Most school districts are implementing RTI. To describe the extent of RTI practices in use across school districts in the U.S., the IDEA-NAIS district survey asked whether RTI is being used in at least one school in the district. Seventy-one percent of districts nationally reported that RTI is being used.

RTI Use Nationally

RTI is used in 61 percent of all elementary schools, 45 percent of middle schools and 29 percent of high schools.

RTI is often implemented as a partnership between the general and special education staffs.

Nationally, 75 percent of districts reported that RTI implementation is led jointly by general and special educators. Eighteen percent of districts reported that RTI is led by general educators and 8 percent reported that special education staff lead RTI.

Nationally, across school districts, RTI is common in reading/language arts.

Seventy percent of districts reported using RTI in reading/language arts in elementary schools, 48 percent reported using RTI in reading/language arts in middle schools, and 31 percent using RTI in reading/language arts in high schools.

District general funds are commonly used to support RTI.

District respondents who reported district usage of RTI during the 2008–2009 school year listed each source used to fund training and implementation of RTI; if more than one source was selected, they indicated the one funding source that provides the most support for the implementation of RTI. Nationally, among districts where RTI was being used, 80 percent indicated that general funds are used to support RTI; 46 percent reported using Title I funds and 41 percent reported using some type of IDEA funds, with 13 percent of districts reporting using IDEA early intervening services funds.

Among districts implementing RTI, about half (48 percent) indicated that district general funds provide the most support for RTI implementation.

(Source: National Assessment of IDEA National Center for Education Evaluation and Regional Assistance, Institute of Education Sciences, United States Department of Education (2011)).

IV. Coordinated Early Intervening Services (CEIS) (34 CFR 300.226)

- A. The IDEA allows a Local Education Agency (LEA) to use up to 15% of its IDEA funds under Part B to develop and implement coordinated, early intervening services (CEIS) for students K-12 (with particular emphasis on students K-3) for students not currently identified as needing special education, but who need additional academic and behavioral support to succeed in general education. These general education supports should be viewed as pre-referral efforts before a child is referred for a special education evaluation. CEIS is not limited to students suspected of having a specific learning disability.
- B. If the LEA has been determined to have significant disproportionality problems in the identification and placement of students with disabilities, the LEA must use 15% of its IDEA Part B funds to provide comprehensive coordinated early intervening services particularly to those children who were overidentified.
- C. Early intervening services include professional development for teachers and other staff to enable personnel to deliver scientifically based academic and behavior interventions including scientifically based literacy instruction. In addition CEIS may include providing educational and behavioral evaluations, services and supports.
- D. The United States Department of Education responded to the question:
What services can be defined as early intervening services? For example, are physical therapy, occupational therapy, and assistive technology considered early intervening services?
State and local officials are in the best position to make decisions regarding the provision of early intervening services, including the specific personnel to provide the services and the instructional materials and approaches to be used. Nothing in the Act or regulations prevents States and LEAs from including related services personnel in the development and delivery of educational and behavioral evaluations, services, and supports for teachers and other school staff to enable them to deliver coordinated, early intervening services. Questions and Answers on Response to Intervention and Early Intervening Services, Question E-3 47 IDELR 196 (United States Department of Education, Office of Special Education and Rehabilitative Services (2007)).
- E. Students with disabilities who are currently identified as needing special education and related services may not receive RTI services that are funded with IDEA funds used for early intervening services pursuant to 34 CFR § 300.226. This is because CEIS is for students in kindergarten through grade 12 (with a particular emphasis on students in kindergarten through grade three) who are not currently identified as needing special education or related services, but who need additional academic and behavioral support to succeed in a general education environment. Questions and Answers on Response to Intervention and Early Intervening Services, Question A-1 47 IDELR 196 (United States Department of Education, Office of Special Education and Rehabilitative Services (2007)).

- F. If the LEA uses Part B funds to provide early intervening services, the LEA must annually report to the SEA on:
- the number of students serviced with CEIS;
 - the number of the students receiving CEIS who subsequently received special education services during the preceding two year period.

Regulatory Comments

- The Comments to the IDEA Regulations emphasize that the use of early intervening services may not delay an appropriate evaluation for special education although there is no specific time limit for receiving such services before an evaluation. (Federal Register, Volume 71, No. 156, Page 46626)
- The Comments explain the early intervening services may not be used for preschoolers. (Page 46627)

G. Data on the Use of Coordinated Early Intervening Services

1. LEAs that are not identified as having significant disproportionality may choose to use up to 15 percent of their Part B funds to develop and provide early intervening services for children who are not yet identified as being in need of special education services.
Eleven percent of districts are voluntarily implementing early intervening services. In districts providing early intervening services, 93 percent of districts provide such services at the elementary school level.
2. In 3 percent of districts, early intervening services were required due to significant disproportionality. Overall, 2.9 percent of districts nationally were required to use early intervening services during the 2008–2009 school year as a result of significant disproportionality in at least one area. Just over 2 (2.3) percent of districts were required to provide early intervening services due to significant disproportionality in identification and under 1 percent of districts were required to provide early intervening services due to significant disproportionality in placement (0.7 percent) or discipline (0.3 percent).

Of districts required to provide early intervening services, 56 percent do so at the middle school and 41 percent do so at the high school level. Of districts electing to provide early intervening services, 41 percent do so at the middle school level and 33 percent do so at the high school level.
3. Most districts (85 percent) reported neither being required nor volunteering to use Part B funds for early intervening services, whereas 11 percent of districts nationally were not required but voluntarily

used a portion of their Part B funds to implement early intervening services in the 2008–2009 school year.

4. Early intervening services are most commonly used for literacy instruction. Eighty-two percent of districts mandated to provide early intervening services and 84 percent of districts electing to provide early intervening services use Part B funds to provide direct instruction, evaluation or supplies related to literacy instruction.
5. Other early intervening services commonly supported by Part B funds include:
 - a. response to intervention (82 percent of early intervening services-mandated districts and 67 percent of early intervening services-voluntary districts);
 - b. behavioral interventions (63 percent of early intervening services-mandated districts and 60 percent of early intervening services -voluntary districts);
 - c. math instruction (63 percent of early intervening services-mandated districts and 49 percent of early intervening services-voluntary districts);
 - d. adaptive and instructional software (55 percent of early intervening services-mandated districts and 41 percent of early intervening services-voluntary districts);
 - e. educational evaluations (43percent of early intervening services-mandated districts and 46 percent of early intervening services-voluntary districts); and
 - f. behavioral evaluations (47 percent of early intervening services-mandated districts and 37 percent of early intervening services-voluntary districts).

(Source: National Assessment of IDEA National Center for Education Evaluation and Regional Assistance, Institute of Education Sciences, United States Department of Education (2011)).

V. General Education Intervention Cases

- A. The Court determined that the district complied with the IDEA when it attempted pre-referral intervention before placing a student in special education. Furthermore, state policy expected that general education interventions would be considered before referring a student for a special education evaluation. Therefore, the school did not deny a FAPE to the student. Johnson v. Upland Unified School District, 36 IDELR 2, 29 Fed. Appx. 689 (United States Court of Appeals, 9th Circuit (2002)). This is an unpublished decision.
- B. The Court found that the school district violated its responsibility under the child find provision of the IDEA when it did not conduct a special education evaluation

of a student. The 10th grade student was referred by the school to a mental health counselor since the student failed every subject and the teachers reported that her work was “gibberish and incomprehensible”, she played with dolls in class and urinated on herself in class.

Although the mental health counselor recommended a special education evaluation, the school district did not refer her for an evaluation and instead promoted her to the 11th grade. The school did finally conduct an evaluation when the parent made a referral. Compton Unified School District v. Addison 598 F.3d 1181, 54 IDELR 71 (United States Court of Appeals, 9th Circuit (2010)). Petition for appeal to the United States Supreme Court denied. Compton Unified School District v. Addison 112 LRP 1321 (United States Supreme Court (2012))

- C. The Court affirmed the District Court’s conclusion supporting the use of a general education intervention team as part of the regular pre-referral process before a student would be evaluated for special education services. The Court noted that the use of alternative programs is not inconsistent with the IDEA for it is sensible policy for a school to explore options in the regular education environment before designating a child as a special education student. The process did not act as a “roadblock” to prevent the parents from requesting an evaluation at any time. In this case, the parents had never submitted a request to have their child evaluated. Lastly, the Court concluded that the IDEA’s procedural safeguards do not apply to general education interventions and therefore the parents do not have a legal right to be part of such team. The mere discussion of a possible special education referral by the team does not become a special education referral triggering the IDEA’s procedural protections. The Court stated:

If, as the Parents argue, any "meeting" regarding a child who is having difficulties triggered the procedural protections of the IDEA, then almost any action at all on the part of the school would constitute a referral. In essence, the Parents argue that merely discussing the possibility of a referral becomes a referral and that any time a child is not referred to a PPT (PPT is the special education team), the school has made an unlawful finding that the student does not qualify for special education. Not only would such a system be counterproductive by discouraging teachers from communicating concerns about students, it would also prevent schools from trying alternative strategies for students who, while perhaps not meeting the statutory definition of a "child with a disability," are in need of extra help in order to succeed academically.

A.P. v. Woodstock Board of Education 50 IDELR 275, 572 F.Supp.2d 221 (United States District Court, Connecticut (2008) Affirmed at 370 F.Appx.

202, 55 IDELR 61 (United States Court of Appeals, 2nd Circuit (2010)). Note: This is an unpublished decision.

- D. The Court found that the school district failed to adhere to its child find efforts under the IDEA. Based on the student's record of consecutive failures on state assessments, continuing difficulty in multiple subjects and the inability of prior accommodations under Section 504 to improve his performance, the school had reason to suspect the student had a disability.
- In addition, the Court found that when a parent requests a special education evaluation, the IDEA gives the parent a right to the evaluation and overrides local district policy which would require a general education intervention team to first consider interventions before conducting the evaluation. In those instances, the required use of the general education intervention team impedes the exercise of rights guaranteed by federal law and would violate the IDEA. El Paso Independent School District v. Richard R., 50 IDELR 256, 567 F. Supp. 2d 918 (United States District Court, Western District, Texas (2008)). Appealed on other grounds.
- E. The parents sued the school under Section 504 for punitive and compensatory damages based on a hearing officer's determination that the school did not timely refer the student for an IDEA evaluation.
- The Court held the use of pre-referral interventions were well intended and did not support the Section 504 liability standard of bad faith or gross departure from acceptable professional standards. Therefore, the 504 claims were dismissed. D.A. v. Houston Independent School District 629 F.3d 450, 55 IDELR 243 (United States Court of Appeals, 5th Circuit (2010)).
- F. The United States Department of Education issued a clarification memo that it would be inconsistent with the IDEA's evaluation procedures for a school to reject a referral for a special education evaluation from a parent and delay the provision of an initial evaluation on the basis that the student has not participated in an RTI (Response to Intervention) strategy or framework.
- The IDEA allows a parent to request an initial special education evaluation at any time. In addition, although the IDEA does not prescribe a specific timeframe from referral for evaluation to requesting parental consent to evaluate, it is the Department's policy that the school must seek parental consent within "a reasonable period of time" after receiving a referral. If the school does not feel a special education is warranted and denies the parent's request, the school must provide written notice of refusal to evaluate the student which is subject to a due process hearing or an administrative complaint should the parent challenge the school's decision. Memorandum to State Directors of Special Education 56 IDELR 50 (United States Department of Education, Office of Special Education Programs (2011)). See also, Letter to Anonymous 19 IDELR 498 (United States Department of Education, Office of Special Education Programs (1992)).

- G. The parents initiated a due process hearing alleging that the school should have acted sooner than it did in determining that their student was eligible for special education services. In kindergarten he received informal remediation interventions in the classroom. In his first grade year he was referred to an Instructional Support Team (IST) which provided reading interventions four days per week. He was diagnosed by a private evaluator and then evaluated by the school. He was not eligible since the Team felt his needs were being met by the IST. He was evaluated again in third grade and was found eligible for special education under the specific learning disability category. The Court concluded that nothing showed that the school failed to act in a timely fashion under its child find obligations. His report cards reflected that he was making progress throughout the first and second grades. When his IST teacher noted increasing difficulties at the end of the second grade and in the first month of third grade the school conducted a second evaluation. The Team then determined that he was IDEA eligible. The school then developed the IEP setting forth the services it would provide within thirty-days of that report. Daniel P. v. Downingtown Area School District 57 IDELR 224 (United States District Court, Eastern District, Pennsylvania (2011))
- H. A student was found eligible for special education as a student with a specific learning disability by a school district that adopted the severe discrepancy criteria for SLD. The student previously received intervention strategies in reading to assist struggling learners under an “RTI model” adopted by the school district. The parents alleged that the IEPs were “fatally defective” since the Team failed to include and consider the student’s RTI data in developing the IEPs. In addition, the parents allege that they were not afforded a meaningful opportunity to participate in the IEP development since they were not provided all the RTI data. The Court upheld the IEPs stating that since the school had adopted the severe discrepancy criteria for SLD eligibility determinations, the IDEA “does not require the disclosure or use of RTI data where it was not used in eligibility determinations”. In developing the IEP, the Team considered evaluation data including standardized assessments (including the WISC IV, WRAML-11 and CTOPP) and relevant classroom behavior observed. The Court also concluded that although the provision of RTI data to the parents may have allowed for greater participation in the development of the IEP, the numerous IEP meetings and disclosure of all statutorily required material was shared with the parents. Therefore, the school complied with IDEA requirements. M.M. v. Lafayette School District 58 IDELR 132 (United States District Court, Northern District, California (2012)).

VI. Discipline Issues and General Education Interventions

- A. IDEA Regulations (34 CFR 300.534 (a),(b) and (c))

A child who has not been determined to be eligible for special education and related services under this part and who has engaged in behavior that violated a

code of student conduct, may assert any of the protections provided for in this part if the public agency had knowledge (as determined in accordance with paragraph (b) of this section) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

Basis of knowledge. A public agency must be deemed to have knowledge that a child is a child with a disability if before the behavior that precipitated the disciplinary action occurred— (1) The parent of the child expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services; (2) The parent of the child requested an evaluation of the child pursuant to §§ 300.300 through 300.311; or (3) The teacher of the child, or other personnel of the LEA, expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education of the agency or to other supervisory personnel of the agency.

Exception. A public agency would not be deemed to have knowledge under paragraph (b) of this section if— (1) The parent of the child—(i) Has not allowed an evaluation of the child pursuant to §§ 300.300 through 300.311; or (ii) Has refused services under this part; or (2) The child has been evaluated in accordance with §§ 300.300 through 300.311 and determined to not be a child with a disability under this part.

- B. The United States Department of Education issued guidance that participation in an RTI process, in and of itself, would not appear to meet the basis of knowledge standards in 34 CFR § 300.534. Questions and Answers on Response to Intervention and Early Intervening Services, Question F-3 47 IDELR 196 (United States Department of Education, Office of Special Education and Rehabilitative Services (2007)).
- C. A student, who was diagnosed as having an Attention Deficit Disorder, was considered a child “at risk” and receiving general education interventions including one-on-one instruction in class, small group instruction and modifications to reduce distractions. An intervention assistance team was convened when the student exhibited continued behavioral problems and referred the student to an outside mental health agency. The student was suspended and ultimately expelled for threatening behavior. The Court held that the school’s failure to convene a manifestation determination review violated the procedural safeguards of the IDEA. When the intervention team referred the student to the outside mental health agency there was sufficient reason to evaluate the student for special education services. The Court ordered compensatory education for the period of time of the student was suspended and that school records of the suspension be expunged. Jackson v. Northwest Local School District 55 IDELR 71 (United States District Court, Southern District, Ohio (2010)). The District Court Judge adopted the Report and Recommendation

of the Magistrate. 55 IDELR 104 (United States District Court, Southern District, Ohio (2010))

VII. Section 504 and General Interventions

- A. OCR had stated that under Section 504's child find requirement "school districts may always use regular education intervention strategies to assist students with difficulties in school. Section 504 requires recipient school districts to refer a student for an evaluation for possible special education or related aids and services or modification to regular education if the student, because of disability, needs or is believed to need such services." Protecting Students With Disabilities, OCR Guidance, Question 31 (United States Department of Education Office for Civil Rights (2011)). However, note that this guidance was based on Section 504 before the 2008 Amendments were passed by the Congress.
- B. The Americans With Disabilities Act Amendments of 2008 changed the definition of an individual with a disability under both the ADA and Section 504. The Amendments emphasize that the definition of "disability" in Section 504 and the ADA should be interpreted to allow for broad coverage. Students who, in the past, may not have been determined to have a disability under Section 504 and Title II may now in fact be found to have a disability under those laws. OCR issued this guidance:

Question: What must a school district do for a student who has a disability but does not need any special education or related services?

Answer: As described in the Section 504 regulation, a school district must conduct an evaluation of any individual who, because of a disability, needs or is believed to need special education or related services, and must do so before taking any action with respect to the initial placement of the person in regular or special education or any significant change in placement. 34 C.F.R. § 104.35(a). If, as a result of a properly conducted evaluation, the school district determines that the student does not need special education or related services, the district is not required to provide aids or services. Neither the Amendments Act nor Section 504 obligates a school district to provide aids or services that the student does not need. But the school district must still conduct an evaluation before making a determination. Further, the student is still a person with a disability, and so is protected by Section 504's general nondiscrimination prohibitions and Title II's statutory and regulatory requirements. See 28 C.F.R. § 35.130(b); 34 C.F.R. §§ 104.4(b), 104.21-23, 104.37, 104.61 (incorporating 34 C.F.R. § 100.7(e)).

For example, suppose a student is diagnosed with severe asthma that is a disability because it substantially limits the major life activity of breathing and the function of the respiratory system. However, based on the evaluation, the student does not need any special education or related service as a result of the disability.

This student fully participates in her school's regular physical education program and in extracurricular sports; she does not need help administering her medicine; and she does not require any modifications to the school's policies, practices, or procedures. The school district is not obligated to provide the student with any additional services. The student is still a person with a disability, however, and therefore remains protected by the general nondiscrimination provisions of Section 504 and Title II. Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools, Question 11 (United States Department of Education, Office for Civil Rights (2012))

- C. A student with diabetes was placed on a student health plan but not evaluated until the parent asked for an evaluation after the student was diagnosed with ADHD.

OCR expressed concern that it appeared from the evidence collected during the investigation that students with medical conditions that may qualify for services pursuant to Section 504 were not, in fact, being referred for evaluations when the school learns of the medical condition, but instead were being provided services thorough individualized healthcare plans. Relying on an individualized healthcare plan and not conducting an evaluation pursuant to Section 504, the school circumvents the procedural safeguards set forth in Section 504. Tyler, Texas Independent School District 56 IDELR 24 (United States Department of Education, Office for Civil Rights (2010)).

In more recent guidance from the Office for Civil Rights, OCR stated:

Q. Are the provision and implementation of a health plan developed prior to the Amendments Act sufficient to comply with the FAPE requirements as described in the Section 504 regulation?

A: Not necessarily. Continuing with a health plan may not be sufficient if the student needs or is believed to need special education or related services because of his or her disability. The critical question is whether the school district's actions meet the evaluation, placement, and procedural safeguard requirements of the FAPE provisions described in the Section 504 regulation. For example, before the Amendments Act, a student with a peanut allergy may not have been considered a person with a disability because of the student's use of mitigating measures (e.g., frequent hand washing and bringing a homemade lunch) to minimize the risk of exposure. The student's school may have created and implemented what is often called an "individual health plan" or "individualized health care plan" to address such issues as hand and desk washing procedures and epipen use without necessarily providing an evaluation, placement, or due process procedures. Now, after the Amendments Act, the effect of the epipen or other mitigating measures cannot be considered when the school district assesses whether the student has a disability. Therefore, when determining whether a student with a peanut allergy

has a disability, the school district must evaluate whether the peanut allergy would be substantially limiting without considering amelioration by medication or other measures. For many children with peanut allergies, the allergy is likely to substantially limit the major life activities of breathing and respiratory function, and therefore, the child would be considered to have a disability. If, because of the peanut allergy the student has a disability and needs or is believed to need special education or related services, she has a right to an evaluation, placement, and procedural safeguards. In this situation, the individual health plan described above would be insufficient if it did not incorporate these requirements as described in the Section 504 regulation. Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools, Question 13 (United States Department of Education, Office for Civil Rights (2012))

- D. The school district was first notified that the student had been diagnosed with ADHD and was being medicated for ADHD when the parent submitted an enrollment form for the student for kindergarten. The parent made repeated mention of the student's ADHD during the school year that followed, which was corroborated by the student's teacher. Over the course of the school year the student had behavioral incidents resulting in in-school or out-of-school suspensions totaling three-and-a-half days.
- The school district noted that it used its Response to Intervention (RTI) processes throughout the student's enrollment, so he was continually being monitored and receiving adjustments and services within the general education curriculum. The student's behavior continued to escalate resulting in several suspensions and progressively intensified RTI from the School. The student eventually had a Section 504 plan developed in March of the student's first grade year.
- The Office for Civil Rights (OCR) found that the school district delayed nearly eighteen months from its first notice that the student may have a disabling impairment to conducting an evaluation to determine whether he needed special education or related services. During that time, the school district received notice several additional times and experienced the student's behavior that was consistent with the reported diagnosis of ADHD. Although the student's diagnosis alone is insufficient to establish that he has a disability, however, the school district should have inquired in a timely fashion about the student's diagnosis and his un-medicated symptoms in order to determine whether an evaluation was warranted. Although the initiation of RTI strategies may have been justified to identify promising instructional strategies to benefit the student, RTI does not justify delaying or denying the evaluation of a child who, because of a disability, needs or is believed to need special education or related services.
- Thus, OCR found that the school district failed to provide the student a free appropriate public education by not conducting a timely evaluation of the student in violation of Section 504. Harrison, Colorado School District Two 57 IDELR 295 (United States Department of Education, Office for Civil Rights (2011)).

- E. A parent of a student shared with the student's teacher that the student had been diagnosed with Tourette's Syndrome. The school met with the parent and explained that the school would be using their school-wide intervention procedures to address the student's behavior issues. A month later the parents asked for an evaluation to determine if their student was eligible for an IEP and/or Section 504 plan. The parents were told that the Problem Solving and Response to Intervention/Instruction (PSRTI) process must be initiated prior to developing a Section 504 plan or IEP. Almost six months later, the Team developed a Section 504 plan. OCR determined that the delay in evaluating the student and developing a Section 504 plan based on the use of the PSRTI process was in noncompliance with Section 504 requirements. The school agreed as part of a Resolution Agreement that the "District may not, because of the use of PSRTI or similar interventions fail to evaluate a student for Section 504 eligibility....". Indian River County School District 58 IDELR 52 (United States Department of Education, Office for Civil Rights (2011)).
- F. A parent requested that her student be evaluated for a Section 504 plan. The principal responded that: "I am aware that you know about 504 after receiving your fax. Special Education is another option, however, they now have in place a guideline that must be followed prior to evaluation into the program. This is called Response to Intervention (RTI). During this process detailed documentation must be done for approximately 6 months." An evaluation did take place approximately 6 months later concluding that the student was eligible for an IEP. OCR determined that the school violated Section 504. Under Section 504, if a parent requests that his or her child be evaluated and the school district refuses to evaluate the child because it does not believe the child is in need of regular education with supplementary services or special education and related services, the school district must nevertheless inform the parent of their procedural safeguards including their right to access the due process hearing procedure to challenge its decision not to evaluate and instead use RTI procedures. Cherokee Independent School District 59 IDELR 18 (United States Department of Education, Office for Civil Rights (2012)).
- G. The parents of a student who was diagnosed by a private physician as having ADHD requested that the student be placed on a Section 504 plan. The high school's Pupil Personnel Services ("PPS") team reviewed the parents' request and concluded that the student did not qualify for a Section 504 plan. Even though the student was not on a Section 504 plan, the PPS recommended that the student receive the following accommodations: (1) all of the accommodations previously granted (opportunities to ask for clarification and if needed, have directions repeated; extended time on in-class tests and exams; copies of syllabi or assignment sheets with due dates; contact with the student's mother at the end of the week if homework assignments were missed; and access

to peer/teacher notes); (2) preferential seating near his teacher; (3) referral to an "Invest" tutor to assist with organization and time management skills; and counseling services provided by a school social worker or school psychologist to address anxiety issues; (4) an email sent to his teachers notifying them that the student had some anxiety approaching adults with questions and/or concerns and that he is shy. The stated purpose for informing his teachers was so they "may be a little more proactive with Zach when something is needed of him or you may believe he may need help in your course."; (5) an offer to meet with the student and School Psychologist, to assess the student's level of anxiety, work on coping strategies, and discuss organizational strategies.

The student and parents filed a lawsuit for damages under Section 504 after the student had graduated. In granting the school's Motion for Summary Judgment, the Court noted that there was no evidence to support an inference that the high school was "deliberately indifferent" to the student's assertion that he was disabled and therefore needed accommodations. What the undisputed evidence shows is that the high school conducted a careful review of the student's circumstances and, though they ultimately determined that he was not "disabled" as they thought law defined the term, they nonetheless proffered some accommodations to the student. Right or wrong in the technical sense, no evidence supported a conclusion that the school was "deliberately indifferent" or a "substantial likelihood" that the student's rights were be violated. Zachary M. v. Board of Education of Evanston Township High School District #202 57 IDELR 244 (United States District Court, Northern District, Illinois (2011)).

Note: This outline is intended to provide workshop participants with a summary of selected Federal statutory/regulatory provisions and selected judicial interpretations of the law. The presenter is not, in using this outline, rendering legal advice to the participants. The services of a licensed attorney should be sought in responding to individual student situations.

Appendix A

Nebraska

The Nebraska Department of Education's RTI website can be found at:
<http://www.education.ne.gov/RTI/index.html>

What is Response to Intervention or RtI?

RtI is an educational service delivery system designed to provide effective instruction for all students using a comprehensive and preventive problem solving approach. It employs a tiered method of instructional delivery, in which the core curriculum addresses and meets the needs of most students (Tier 1), additional instruction is provided for those needing supplementary intervention support (Tier 2), and intensive and individualized services are provided for the students who continue to demonstrate more intensive needs (Tier 3). At its foundation, RtI includes measuring performance of all students, and basing educational decisions regarding curriculum, instruction, and intervention intensity on student data.

RtI Implementation Plans

Self Assessment

If your district elects to utilize data from an RtI system for the verification of students for special education services, please complete and submit the [Response to Intervention Implementation Plan Self Assessment template](#), to the Nebraska Department of Education, Special Education.) For your convenience, the RtI Implementation Plan may be completed online. Signatures of all RtI leadership team members, including the district administrator, are required at the time of submission.

If you are not utilizing RtI data for special education eligibility, submitting your RtI Implementation Plan to the Nebraska Department of Education is **optional**.

To assist you in writing your plan, please refer to the [Essential Elements for Response-to-Intervention](#). Your RtI Implementation Plan should demonstrate how you are implementing the eight essential elements. If your team determines the need for further technical assistance, please refer to the Universal Technical Assistance or Topical Training sections of the RtI Professional Development Plan, 2010-2011

In making decisions about the use of RtI data for verification purposes, it is recommended your team refer to the section on Specific Learning Disability from the Verification Guidelines for Children with Disabilities, Technical Assistance Document,
<http://www.education.ne.gov/sped/technicalassist/verificationguidelines.pdf>

Your district's Special Education Regional Representative and NDE Department Representatives in Curriculum, Assessment, School Improvement, Title I, and Staff Development/Instruction will receive a copy of your district Response to Intervention Implementation Plan Self Assessment for reference during respective school visits/consultations.

IOWA

Iowa Department of Education's RTI website can be found at :

http://educateiowa.gov/index.php?option=com_content&view=article&id=2562&Itemid=2683

The following are excerpts from the website:

WHAT IS RESPONSE TO INTERVENTION?

Response to Intervention (RtI) is a process by which schools use data to identify the academic and behavioral supports each and every student needs to be successful in school and leave school ready for life. The process provides students with evidence-based instruction and interventions matched to their needs and monitors student progress to improve their educational outcomes. RtI also allows educators to evaluate the overall health of their system and target resources by providing the necessary data to determine which elements of the education system are performing adequately and which require further development. RtI is a decision-making framework composed of evidence-based practices in assessment and instruction. RtI *is not* a packaged program, set of assessments or curriculum that can be purchased.

Essential Components

RtI is also a framework for educating all children to high levels of proficiency. It is driven by general education, though it has been demonstrated to be effective for students served in special programs (e.g., Special Education, English Language Learners etc.) The RtI Process takes place within Universal, Targeted, and Intensive levels of instruction. Each of these levels provides increasingly intensive instruction, based on student needs, to support student progress toward proficiency. The essential components that must be in place to ensure that RtI is implemented effectively are below. Critical to each and every one of these components is fidelity of implementation.

- (a) Robust Universal instruction in the Iowa Core
- (b) Universal screening
- (c) Evidence-based instructional interventions at the Targeted and Intensive levels
- (d) Progress monitoring
- (e) Data-based decision-making

RtI uses universal screening information to identify struggling students at the earliest grade levels and provide students with additional instructional time and intensity during the school day. RtI also provides more advanced curriculum and additional instructional time and intensity to those who are on-track to exceed benchmarks and need extended learning. With RtI, students are monitored often to ensure they are progressing, and when they are not, they receive additional learning opportunities.

A valid, reliable, and technically adequate universal screening assessment is used to determine students' likelihood of future success on a relevant outcome measure. A healthy system would show that 80 -90% of the students are projected to be successful on an outcome measure and therefore are responding positively to the instruction they are receiving.

Universal screening data are used to determine students' likelihood of future success on a relevant outcome measure, or likelihood of meeting or exceeding future benchmarks. A valid, reliable, and technically adequate universal screening assessment will predict a high likelihood of future success for 80-90% of students in a healthy system. For most of these students, instruction in an effective Universal curriculum and instructional program should be sufficient to keep them on-track. A few of these students who are particularly advanced will require more intensive support to ensure that they are achieving the growth of which they are capable.

In a healthy system the remaining 5 - 20 percent of students may not achieve proficiency based on universal instruction alone. These students need additional, targeted support to be successful in meeting the standards outlined in the Iowa Core, which is provided through the Universal curriculum and instructional program. Additional support is given in the form of evidence-based instructional or behavioral interventions that match the needs of the students. Interventions are implemented while progress is monitored using a valid and reliable progress monitoring assessment to determine whether the student is responding to the instruction, intervention, or support being provided.

The progress monitoring data along with other relevant information about student skills, (i.e., grades, work samples, observations) are reviewed frequently to determine students response to the additional supports they are receiving. In a healthy system it is possible that 1 - 5 percent of students will still require additional support beyond the universal curriculum and evidence-based instructional or behavioral interventions. For this small group of students additional data are often required to determine the best way for educators to match evidence-based interventions to their needs. Progress monitoring is continued and may be conducted more frequently as these students need to be evaluated on a more consistent basis to ensure they are responding favorably to the instruction they are receiving.

How does an RtI system benefit students with disabilities?

For those students not yet identified as having a disability an RtI system may benefit them by identifying them as at-risk earlier than would have otherwise occurred. Students should be identified sooner with the use of a universal screener and progress monitoring assessments which would then allow educators to provide evidence-based interventions matched to students needs. For those students who are already identified they will continue to receive individualized instruction and their progress will be monitored. With consistent progress monitoring it can be determined when a student's performance warrants less intensive interventions and when it may require more intensive supports within the tiered system of support.

Iowa Department of Education Guidance Document: Response to Intervention (December 2011)

Kansas

The Kansas Department of Education's Multi-Tier System of Supports website can be found at: www.kansasmtss.org

The following are excerpts from the website:

Why call it MTSS opposed to RtI?

As you read publications and talk with individuals about RtI you will soon realize they are talking about a variety of different issues. The term RtI is typically much narrower than what is meant by MTSS. Some of these topics include: the identification of a student with specific learning disabilities under IDEA, individual student problem solving approach to interventions, standard protocol approach to interventions or possibly a school wide approach. In Kansas, MTSS encompass all of these issues and more as you can see in the definition and core beliefs.

What about special education evaluations using MTSS?

If intense intervention attempts are unsuccessful, or if what works requires a very intense or high level of support to maintain the child's progress, the team may carry the intervention forward into a special education initial evaluation. Also, at any point in time regardless of the interventions or supports being provided to the student, the parent may request an initial evaluation. During any initial evaluation the team will be part of carrying out a more intense intervention plan to determine (1) is the child a child with an exceptionality and (2) does the child need specially designed instruction in order to progress in the general education curriculum. The outcome of this process is always an intervention plan. If the child is found to be a child with an exceptionality, the plan will be an Individual Education Plan (IEP). If the child is not found to be a child with an exceptionality, the plan may be a Student Improvement Plan, or in some instances a Section 504 plan. In the end, it should be the school's goal to have a plan in place that they think will work for the child and a progress monitoring system to help determine if the plan is working.

Introduction

A Multi-Tier System of Supports (MTSS) is a term used in Kansas to describe how schools go about providing supports for each child in their building to be successful and the processes and tools teachers use to make decisions.

There are two federal laws that have made a difference in how schools deliver and coordinate services for children. The first is the Elementary and Secondary Education Act (ESEA); most recently referred to as the No Child Left Behind (NCLB) Act. This Act requires that by the year 2014 all of students are to meet the proficiency targets in the areas of reading and math, that schools would have a high graduation rate, and conversely a low dropout rate.

The second law influencing districts and schools is the 2004 reauthorization of the Individuals with Disabilities Education Act (IDEA). IDEA is the federal law that defines special education. The concept of Response to Intervention (RtI) was introduced in the 2004 reauthorization of IDEA and has influenced the

way districts identify and serve students with exceptionalities.

These two laws, when taken together, support the beliefs and practices behind Kansas' Multi-Tier System of Supports.

Definition

MTSS is a coherent continuum of evidence based, system-wide practices to support a rapid response to academic and behavioral needs, with frequent data-based monitoring for instructional decision-making to empower each Kansas student to achieve to high standards.

Focus

The focus of MTSS is system level change across the classroom, school, district and state.

Core Beliefs

- Every child learns and achieves to high standards
- Learning includes academic and social competencies
- Every member of the learning community continues to grow, learn and reflect
- Every leader at all levels is responsible for every child
- Change is intentional, coherent and dynamic

How to Achieve these Beliefs

- Every child will be provided a rigorous and research-based curriculum
- Every child will be provided effective and relentless teaching
- Interventions will be provided at the earliest identification of need
- Policy will be based on evidence based practice
- Every educator will continuously gain knowledge and develop expertise to build capacity and sustain effective practice
- Resources will be intentionally designed and redesigned to match student needs
- Every leader will be responsible for planning, implementing and evaluating
- Academic and behavioral data will be used to inform instructional decisions
- Educators, families and community members will be part of the fundamental practice of effective problem-solving and instructional decision making
- An empowering culture will be enhanced/developed that creates collective responsibility for student success

